TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 470

WILLIAM A. W. STEWART, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 19, 1931

CERTIORARI GRANTED NOVEMBER 30, 1931

(36,284)

(36,284)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 470

WILLIAM A. W. STEWART, PETITIONER,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

	Original	Print
Proceedings before U. S. Board of Tax Appeals	1	1
Docket entries	1	1
Petition	3	2
Exhibit "A"—Notice of deficiency	7	4
Answer	11	6
Stipulation as to facts	13	7
Findings of fact and opinion	18	9
Decision	21	11
Notice of filing petition for review	23	12
Petition for review	24	13
Notice of filing præcipe	30	16
Præcipe	32	17
Proceedings in United States circuit court of appeals, second circuit	34	19
Motion for substitution	34	19
Order granting motion for substitution	36	21
Opinion, Hand, J.	36	21
Judgment	44	29
Clerk's certificate	44	29
Order allowing certiorari	45	31

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1931

[fol. 1]

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 29229

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DOCKET ENTRIES

Appearances:
For Taxpayer: John A. Kratz, Esq., C. H. Butler, Esq.
For Commissioner: L. A. Luce, Esq.

1927.

June 21. Petition received and filed. Taxpayer notified.
" 22. Copy of petition served on General Counsel.
Aug. 19. Answer filed by G. C.
" 22. Copy of answer served on taxpayer. General Calendar.

1929.

Jan. 31. Hearing set Feb. 26, 1929.
Feb. 21. Motion to consolidate for hearing with docket 29,228 and continue to Day Calendar of March 19, 1929, filed by taxpayer. See 29,228. Granted to 3-19-29.

[fol. 2]

Mar. 19. Hearing had before Mr. Green. Briefs due in 30 days. Reply briefs due in 10 days. Submitted to Mr. Green.
" 22. Transcript of hearing, March 19, 1929, filed.
Apr. 17. Brief filed by G. C. See 29,228.
Nov. 30. Decision entered. Wm. R. Green, Div. 13.
" 30. Findings of fact and opinion rendered. Wm. R. Green, Div. 13. Judgment will be entered for the respondent.

1930.

May 14. Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error and proof of service filed by taxpayer.
" 14. Præcipe with proof of service filed.

Now, June 10, 1930, the foregoing Docket Entries, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed June 21, 1927.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated April 23, 1927, bearing symbol numbers IT:PA:3-60D-RMH, and as a basis for this proceeding alleges as follows:

1. The petitioner is an individual and resident of New York City with his offices located at No. 45 Wall Street, New York City, New York.

2. The notice of deficiency, a copy of which is hereto attached and marked Exhibit "A", was mailed to the petitioner on April 23, 1927.

3. The taxes in controversy are income taxes for the calendar year 1924. The amount of deficiency claimed by the Commissioner is $7,435.71. The amount of tax in dispute is $5,933.23.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

[fol. 4] (a) The Commissioner erred in his determination that the twenty-five per cent. reduction provided by title XII of the Revenue Act of 1924 does not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

(b) The Commissioner erred in his determination that the provisions of title XII of the Revenue Act of 1924 allowing a credit or refund of twenty-five per cent of the tax shown by 1923 returns did not reduce the rates for 1923 within the meaning of Section 207 (b) of the Revenue Act of 1924.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

The petitioner filed an income tax return for the calendar year 1924. The principal part of his income was his distributive share as a partner of the law firm of Stewart & Shearer. The partnership made a return upon the basis of a fiscal year ending on April 30, 1924. The petitioner included in his return for the calendar year 1924 his distributive share of the partnership profits for the fiscal year of the partnership ending on April 30, 1924. The net income of the petitioner for the calendar year 1924 has been determined to be $91,165.35, of which amount $71,462.39 represents that part of the partnership profits attributable to 1923. The tax on income attributable to 1924 has been determined to be $686.43. The tax on $71,462.39 attributable to 1923 and taxable at rates in effect for 1923 [fol. 5] has been determined to be $23,732.92. The petitioner contended before the Treasury Department that the provisions of title XII of the Revenue Act of 1924 allowing a credit of twenty-five per cent. of the tax shown by 1923 returns reduced the rates for 1923 and that the tax of $23,732.92 computed by the Commissioner on income attributable to 1923 should be reduced by twenty-five per cent. or an amount of $5,933.23.

Wherefore the petitioner prays that this Board may hear the proceeding and that the Board decree:

1. That the effect of title XII of the Revenue Act of 1924 allowing a credit or refund of twenty-five per cent. of the tax shown by 1923 returns was to reduce the rates for 1923 within the meaning of Section 207 (b) of the Revenue Act of 1924.

2. That the petitioner is entitled to have the proposed additional tax reduced by the amount of $5,933.23 representing twenty-five per cent. of the tax on income attributable to 1923.

Harry J. Campaign, Counsel for Petitioner, 45 Wall Street, New York City. John A. Kratz, Counsel — Petitioner, 1537 Eye Street N. W., Washington, D. C.

[fol. 6] *Duly sworn to by William A. W. Stewart. Jurat omitted in printing.*

[fol. 7] EXHIBIT "A" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

IT:PA:3-60D. RMH.

April 23, 1927.

Mr. William A. W. Stewart, 45 Wall Street, New York, New York.

SIR: The determination of your income tax liability for the years 1923 and 1924, as set forth in office letter dated April 11, 1927, disclosed a deficiency in tax of $7,435.71 for 1924 and an overassessment of $1,288.73 for 1923, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals [fol. 8] and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:3-60D-RMH. In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items to which you agree.

Respectfully, D. H. Blair, Commissioner, by (Signed) C. R. Nash, Assistant to the Commissioner.

Inclosures: Statement, Form A, Form 882.

[fol. 9] Statement

IT:PA:3-60D. RMH.

April 23, 1927.

In re Mr. William A. W. Stewart, 45 Wall Street, New York, New York

Years	Deficiency in tax	Over-assessment
1923	.....	$1,288.73
1924	$7,435.71	.....
Total	$7,435.71	$1,288.73

The report of the Internal Revenue Agent in Charge at New York, New York, dated March 11, 1927, has been reviewed and approved by this office with the following exception:

1923

The examining officer failed to take into consideration adjustment by which an overassessment of $19.92 was previously allowed by this office.

The statements contained in your letter of protest dated February 25, 1927, have been given careful consideration by this office. However, on the basis of information on file in this office, the determination of your tax liability, as indicated above, appears to be correct.

[fol. 10] The overassessment shown herein will be made the subject of a Certificate of Overassessment, which will reach you in due course through the office of the Collector of Internal Revenue for your district. If the tax in question has not been paid, the amount will be abated by the Collector. If the tax has been paid, the amount of overpayment will first be credited against unpaid income tax for another year, or years, and the balance, if any, will be refunded to you by check of the Treasury Department. It will thus be seen that the overassessment does not indicate the amount which will be credited or refunded, since a portion may be an assessment which has been entered but not paid.

Payment should not be made until a bill is received from the Collector of Internal Revenue for your district, and remittance should then be made to him.

Now, June 10, 1930, the foregoing Petition, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 11] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed Aug. 19, 1927

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Respondent admits that the petitioner is an individual with a principal place of business at No. 45 Wall Street, New York City, New York.

2. Respondent admits that a notice of deficiency was mailed to the petitioner on April 23, 1927.

3. Respondent admits that the taxes in controversy are income taxes for the calendar year 1924 in an amount not less than $5,933.23.

[fol. 12] 4. Respondent denies that he erred in determining the tax set forth in said notice of deficiency and further denies that he erred as alleged in sub-paragraphs (a) and (b) of paragraph 4 of the petition.

5. Respondent denies that the petitioner is entitled to have the proposed additional tax for the year 1924 reduced by the sum of $5,933.23, as alleged in paragraph 5 of the petition.

6. Respondent denies generally and specifically each and every allegation contained in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's appeal be denied.

A. W. Gregg, General Counsel, Bureau of Internal Revenue. Of Counsel, L. A. Luce, Special Attorney, Bureau of Internal Revenue.

Now, June 10, 1930, the foregoing Answer, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

[fol. 13] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Titles omitted]

STIPULATION AS TO FACTS—Filed Mar. 19, 1929

It is hereby stipulated and agreed by and between counsel for the respective parties hereto that the following is a statement of all the material facts involved in the above-entitled appeals:

I. That George L. Shearer is an individual and a resident of New York, with his offices located at 45 Wall Street, New York, New York.

[fol. 14] II. That William A. W. Stewart is an individual and a resident of New York, with his offices located at 45 Wall Street, New York, New York.

III. That the partnership of Stewart & Shearer made and filed a return on the basis of a fiscal year ended April 30, 1924, and that the partnership was composed of George L. Shearer and William A. W. Stewart.

IV. That George L. Shearer made and filed his return on the basis of a calendar year.

V. That William A. W. Stewart made and filed his return on the basis of a calendar year.

VI. That the tax as computed by the respondent on the income of George L. Shearer for the calendar year 1924 is as follows:

Total net income		$36,151.15
Income subject to surtax		36,151.15
Less: Exemption	$2,900.00	
Dividends	4,025.67	
		6,925.67
Income subject to normal tax		$29,225.48

[fol. 15] Tax at 2% on $4,000.00		80.00
Tax at 4% on 4,000.00		160.00
Tax at 6% on balance $21,225.48		1,273.53
Surtax		1,558.14
(a) Normal tax @ 8% on $67,175.05 1923 income		5,374.00
(b) Surtax on $67,462.38 1923 income		21,870.32
Total tax		30,315.99
Credits: 25% of normal tax on earned income	51.00	51.00
Total tax assessable		30,264.99
Tax previously assessed		21,776.81
Additional to be assessed		$8,488.18

NOTE.—Paragraphs (a) and (b) represent the tax computed on that portion of the partnership income allocated to the eight months falling within the year 1923.

VII. That the tax as computed by the respondent on the income of William A. W. Stewart for the calendar year 1924 is as follows:

Total net income		$19,702.96
Income subject to surtax		19,702.96
Less: Exemption	None	
Dividends	$7,697.77	
		7,697.77
Income subject to normal tax		$12,005.19
[fol. 16] Tax at 2% on $4,000.00		$80.00
Tax at 4% on 4,000.00		160.00
Tax at 6% on balance $4,005.19		240.31
Surtax		208.12
(a) Normal tax @ 8% on $71,175.06 1923 income		5,694.00
(b) Surtax on $71,462.39 1923 income		18,038.92
Total tax		$24,421.35

Credits: 25% of normal tax on earned income	90.00	90.00
Total tax assessable		$24.331.35
Tax previously assessed		16,895.64
Additional to be assessed		$7,435.71

NOTE.—Paragraphs (a) and (b) represent the tax computed on that portion of the partnership income allocated to the eight months falling within the year 1923.

VIII. The sole issue in these appeals is whether or not the petitioners are entitled to a reduction of 25% of the tax shown in (a) and (b) of Paragraphs numbered VI. and VII.

[fol. 17] IX. That the entire evidence is contained in the foregoing stipulation of fact.

Harry J. Campaign, Counsel for Petitioner. C. M. Charest, General Counsel, Bureau of Internal Revenue, Counsel for Respondent.

vh-k 3-9-29.

Now, June 10, 1930, the foregoing Stipulation, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 18] BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 29228

GEORGE L. SHEARER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 29229

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated November 30, 1929

The provisions of Title XII of the Revenue Act of 1924, do not authorize a 25 per cent reduction of tax on calendar

year 1924 income reported in 1925, but taxable in part at 1923 rates under Section 207(b) of the Revenue Act of 1924. Charles Colip, 5 B. T. A. 123 followed.

C. H. Butler, Esq., for the Petitioners.
L. A. Luce, Esq., for the Respondent.

FINDINGS OF FACT AND OPINION

[fol. 19] In these proceedings, which have been consolidated for hearing and decision, the petitioners seek a redetermination of their income tax liabilitities for the calendar year 1924, for which year the respondent has determined a deficiency as to George L. Shearer in the amount of $8,488.18, of which $6,811.08 is in controversy, and as to William A. W. Stewart in the amount of $7,435.71, of which $5,933.23 is in controversy.

The sole question involved in both proceedings is whether the 25 per cent reduction provided by Title XII of the Revenue Act of 1924, reduces the calendar year 1924 tax payable in 1925, of an individual partner whose taxable income for the calendar year 1924 is made up in part of a share of the income of a partnership whose fiscal year ended April 30, 1924.

The facts were stipulated.

Findings of Fact

The petitioners are individuals and residents of New York, with their offices located at 45 Wall Street, New York City. They made and filed their individual income tax returns on the basis of a calendar year.

The partnership of Stewart & Shearer, whose members are the petitioners herein, made and filed a partnership return of income on the basis of a fiscal year ended April 30, 1924.

The respondent determined the net income of petitioner Shearer for the calendar year 1924, to be $103,613.53 of which amount $67,462.38 represents that part of the net income of the partnership attributable to the year 1923. [fol. 20] He further determined that the tax on the income attributable to 1924 was $3,071.67, and that the tax on the income attributable to 1923 was $27,244.32.

The respondent determined the net income of petitioner Stewart for the calendar year 1924, to be $91,165.35, of

which amount $71,462.39 represents that part of the net income of the partnership attributable to the year 1923. He further determined that the tax on the income attributable to 1924, was $688.43, and that the tax on the income attributable to 1923 was $23,732.92.

Opinion

GREEN: The petitioners contend that under Title XII of the Revenue Act of 1924, the respondent should have reduced the tax on the income attributable to 1923 by 25 per cent. As previously stated, the amounts of taxes here in controversy are $6,811.08 as to Shearer, and $5,933.23 as to Stewart, which represents 25 per cent of the amounts of $27,244.32 and $23,732.92, respectively, set out in our findings as representing the tax on each of the petitioner's share of partnership net income attributable to the year 1923.

We have held in a long list of decisions following Charles Colip, 5 B. T. A. 123, that the statute did not permit the 25 per cent reduction here contended, for where the facts are such as are present in the instant proceedings. The respondent's determination must, therefore, be approved. See also Anna M. Tighe, et al., 12 B. T. A. 670, which case is now pending before the Circuit Court of Ap-
[fol. 21] peals for the Seventh Circuit, October term 1929, as Docket No. 4188.

Judgment will be entered for the respondent.

Now, June 10, 1930, the foregoing Findings of Fact and Opinion, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS, WASHINGTON

Docket No. 29229

WILLIAM A. W. STEWART, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

DECISION

Pursuant to the Board's findings of fact and opinion, promulgated November 30, 1929, it is

[fol. 22] Ordered and Decided: That there is a deficiency of $7,435.71 for the year 1924.

Enter.

(Signed) William R. Green, Jr., Member United States Board of Tax Appeals.

Entered Nov. 30, 1929.

A True Copy. Teste:

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

Now, June 11, 1930, the foregoing Decision, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

[fol. 23] Before United States Board of Tax Appeals

[Title omitted]

Notice of Filing Petition for Review—Filed May 14, 1930

C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C., Attorney for Respondent.

Sir: Please take notice that on the 14th day of May, 1930, the undersigned will present to this Board and file with the Clerk thereof the petition of William A. W. Stewart, a copy of which is enclosed herewith, for the review by the United States Circuit Court of Appeals for the Second Circuit of the final order and decision of the Board in the above entitled proceeding entered on the records of the said Board on the 30th day of November, 1929.

Dated New York City, May 14th, 1930.

Henry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

[fol. 24] Copy of the within notice and copy of the petition for review is hereby accepted this 14th day of May, 1930.

C. M. Charest, General Counsel, Bureau of Internal Revenue.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM A. W. STEWART, Petitioner,

against

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION FOR REVIEW—Filed May 14, 1930

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petitioner is aggrieved by the decision of the United States Board of Tax Appeals rendered against him on November 30, 1929 in the case of his appeal to the said Board [fol. 25] from a deficiency in income taxes for the year 1924 determined by the Commissioner of Internal Revenue, which appeal was numbered 29229 on the docket of the Board, and respectfully submits this petition for review thereof by the Circuit Court of Appeals for the Second Circuit.

I

Statement of Nature of the Controversy

The petitioner on June 21, 1927, duly filed with the United States Board of Tax Appeals in pursuance of the provisions of the Revenue Act of 1926, a petition requesting a redetermination of a deficiency in 1924 income taxes against him amounting to $7,435.71. Of this additional tax $1,502.48 results from adjustments in the return filed by the petitioner to which no objection was made. The balance of the proposed additional tax, amounting to $5,933.23, is the amount of tax in dispute. The principal part of petitioner's income as shown in his 1924 income tax return represented his distributive share as a partner of the law firm of Stewart & Shearer. The partnership made an income tax return on the basis of a fiscal year ending on April 30, 1924. The petitioner included in his individual return for the calendar year 1924 his distributive share of the partnership profits for the fiscal year ending on April 30, 1924. Under such conditions the rates of tax for the calendar year during which such fiscal year of the partnership began applied to that amount of the

[fol. 26] petitioner's share of partnership profits equal to the proportion which the part of such fiscal year falling within such calendar year bears to the full fiscal year. The rates of tax for the calendar year during which such fiscal year ended applied to an amount of petitioner's share of such partnership net income equal to the portion which the part of such fiscal year ending within such calendar year bears to the full fiscal year. As a result of this two-thirds of the petitioner's share from the partnership profits derived for the fiscal year ending April 30, 1924, was taxable at rates in effect for the calendar year 1923 and one-third at rates in effect for the calender year 1924.

The net income of the petitioner for the calendar year 1924 has been determined to be $91,165.35, of which amount $71,462.39 represents that part of the partnership profits attributable to 1923. The tax on income attributable to 1924 has been determined by the Commissioner to be $688.43. Tax on $71,462.39, attributable to 1923 and taxable at rates in effect for 1923, has been determined by the Commissioner to be $23,732.92.

Section 1200 (a) (Title XII) of the Revenue Act of 1924 reduced the tax on 1923 incomes by providing that any person making a return for the calendar year 1923 was entitled to an allowance by credit or refund of twenty-five per cent of the amount shown as the tax upon his return. The petitioner contended before the Treasury Department and the Board of Tax Appeals that the provisions of Title XII of the Revenue Act of 1924 allowing [fol. 27] a credit or refund of twenty-five per cent of the tax shown on 1923 returns reduced the rates for 1923 and that the tax of $23,732.92 computed by the Commissioner on income attributable to 1923 should be reduced by twenty-five per cent, or an amount of $5,933.23.

On August 19, 1927, the respondent filed with the Board of Tax Appeals an answer to the petition, the cause thereby being at issue under the rules of practice of said Board. The case was submitted to the Board upon an agreed statement of facts. On November 30, 1929, the Board handed down an opinion adverse to the petitioner's contentions and held that the provisions of Title XII of the Revenue Act of 1924 allowing a credit of twenty-five per cent. of the tax shown on 1923 returns did not reduce the rates for 1923 and did not reduce the 1924 tax payable in 1925 of an indi-

vidual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

The petitioner paid the disputed tax under an agreement with the Commissioner of Internal Revenue that it would be refunded in the event of a successful prosecution of his appeal.

II

Designation of Court of Review

Your petitioner believes and avers that errors were committed by the Board to the damage and prejudice of the petitioner and desires a review thereof by the United States Circuit Court of Appeals for the Second Circuit [fol. 28] within which Circuit is located the office of the Collector of Internal Revenue with whom the petitioner filed his 1924 income tax return.

III

Assignment of Errors

The petitioner as a basis of review makes the following assignment of errors:

1. The Board erred in failing to hold that the effect of Title XII of the Revenue Act of 1924 allowing a credit or refund of twenty-five per cent. of the tax shown on 1923 returns was to reduce the rates for 1923 within the meaning of Section 207 (b) of the Revenue Act of 1924.

2. The Board erred in holding that the twenty-five per cent. reduction in tax provided by Title XII of the Revenue Act of 1924 does not reduce the 1924 tax payable in 1925 of an individual partner whose 1924 income is made up in part of a share of partnership income for a fiscal year beginning in 1923.

3. The Board erred in failing to allow the petitioner a credit of twenty-five per cent. of the tax on that portion of the partnership income shown on his return for 1924 which was attributable to the year 1923.

4. The Board erred in rendering a decision for the respondent.

[fol. 29] Wherefore the petitioner prays that this Honorable Court may review said decision of said Board of Tax Appeals entered herein against him and reverse and set aside same and for such other and further relief as to the Court may seem just and proper.

William A. W. Stewart, Petitioner. Harry J. Compaign, Attorney for Petitioner, 45 Wall Street, New York City.

Duly sworn to by William A. W. Stewart. Jurat omitted in printing.

[fol. 30] Now, June 10, 1930, the foregoing Petition for Review with Proof of Service thereon, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals. (Seal.)

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PRÆCIPE—Filed May 14, 1930

To C. M. Charest, General Counsel, Bureau of Internal Revenue, Washington, D. C., attorney for respondent.

SIR: Please take notice that on the 14th day of May, 1930, I filed with the Clerk of this Court a præcipe designating [fol. 31] the portions of the record to be transmitted to the Circuit Court of Appeals for the Second Circuit on the appeal taken in the above case, a copy of which præcipe is hereby annexed and herewith served on you.

Dated this 14th day of May, 1930, New York City, New York.

Harry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

Service of the within notice and copy of præcipe is hereby accepted on this 14th day of May, 1930.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

[fol. 32] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE—Filed May 14, 1930

To the Clerk of the United States Board of Tax Appeals:

You will please prepare and, within the sixty days of the filing of the petition for review in the above stated case, transmit to the Clerk of the United States Circuit Court of Appeals for the Second Circuit certified copies of the following documents:

1. The docket entries of proceedings before the United States Board of Tax Appeals in the above entitled case.
2. Pleadings before the Board.
3. Stipulation setting forth agreed statement of facts.
[fol. 33] 4. Findings of fact, opinion and decision of the Board.
5. Final order of redetermination.
6. Petition for review.
7. Proof of service and notice of filing petition for review.
8. This designation of record.

The foregoing to be prepared, certified and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

Harry J. Campaign, Attorney for Petitioner, 45 Wall Street, New York City.

Now, June 10, 1930, the foregoing Præcipe, with Proof of Service thereon, certified from the record as a true copy.

B. D. Gamble, Clerk U. S. Board of Tax Appeals.
(Seal.)

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

B. T. A. No. 29229. C. C. A. No. —

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

MOTION

Comes now David Burnet as Commissioner of Internal Revenue, by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and respectfully shows to the Court;

That since the filing of the petition for review in the above-entitled cause, Robert H. Lucas, who was at that time Commissioner of Internal Revenue, and who was the respondent at that time in the above-entitled cause, has resigned as said Commissioner of Internal Revenue, and his resignation has been duly accepted;

That said Robert H. Lucas ceased to be Commissioner of Internal Revenue on August 15, 1930;

That David Burnet was duly ap-ointed as Commissioner of Internal Revenue to succeed the said Robert H. Lucas and has duly qualified as said Commissioner of Internal Revenue;

That on August 20, 1930, David Burnet became Commissioner of Internal Revenue, and ever since that time has been and now is Commissioner of Internal Revenue;

Wherefore, it is accordingly prayed that the above-entitled cause be revived so that this action will be pending against the said David Burnet, as Commissioner of Internal Revenue, and that the said David Burnet, as Commissioner of Internal Revenue, may be substituted as the respondent in this cause for the said Robert H. Lucas, formerly Commissioner of Internal Revenue.

It is further shown to the Court that there is substantial need for so continuing and maintaining this cause because if it is not so continued and maintained, the order of the

United States Board of Tax Appeals, for the review of which the petition for review in this cause was filed, will become final; the tax found by the said Board of Tax Appeals to be due will be assessed and collected from this petitioner without recourse to further contest its legality, or obtain a refund thereof.

It is also shown to this Court that the said David Burnet, as Commissioner of Internal Revenue, by and through his attorney, has caused to be mailed to the attorney of record for the petitioner in the above-entitled cause a copy of this motion to revive this action in the name of David Burnet, as Commissioner of Internal Revenue, and to have his name substituted as the respondent in this cause.

C. M. Charest, General Counsel, Bureau of Internal Revenue, Attorney for David Burnet, as Commissioner of Internal Revenue.

DISTRICT OF COLUMBIA, ss:

C. M. Charest, General Counsel, Bureau of Internal Revenue, being duly sworn, says that he is the attorney for David Burnet, as Commissioner of Internal Revenue, and as such is duly authorized to verify this motion; that he has read the foregoing motion and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as may be stated upon information and belief, and those facts he believes to be true.

C. M. Charest.

Sworn and subscribed to before me this 7 day of Nov., 1930. Marcellette M. Taylor, Notary Public, District of Columbia. My Commission expires March 31, 1935. (Seal of Marcellette M. Taylor, Notary Public, District of Columbia.)

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York,

on the 20th day of November, one thousand nine hundred and thirty—.

Present: Hon. Martin T. Manton, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

A motion having been made herein by counsel for the Respondent to substitute David Burnet, Commissioner of Internal Revenue, in the place and stead of Robert H. *Ucas*, Commissioner of Internal Revenue, to respondent,

Upon consideration thereof, it is

Ordered that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. Willia, A. W. Stewart v. Commissioner of Internal Revenue. Order. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 20, 1930. William Parkin, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM A. W. STEWART, Appellant,

against

COMMISSIONER OF INTERNAL REVENUE, Appellee

GEORGE L. SHEARER, Appellant,

against

COMMISSIONER OF INTERNAL REVENUE, Appellee

Before L. Hand, Augustus N. Hand, and Chase, Circuit Judges

Appeals from the United States Board of Tax Appeals

Petitions by William A. W. Stewart and George L. Shearer, taxpayers, to review orders of the United States

Board of Tax Appeals, sustaining the action of the Commissioner of Internal Revenue in determining a deficiency in the income taxes of each taxpayer for the year 1924. Affirmed.

Harry J. Campaign, Attorney for Appellants; William A. W. Stewart, George L. Shearer, and Harry J. Campaign, Counsel.

G. A. Youngquist, Assistant Attorney General; Sewall Key and Norman D. Keller, Special Assistants to the Attorney General; C. M. Charest, General Counsel, Bureau of Internal Revenue, and J. K. Polk, Special Attorney, Bureeau of Internal Revenue, of counsel, for Appellee.

Raymond M. White, Amicus Curiæ.

AUGUSTUS N. HAND, Circuit Judge:

The above appeals were argued together and relate to the income taxes of the appellants who are law partners doing business under the name of Stewart & Shearer. They made and filed their individual returns on the basis of a calendar year, and the additional taxes found against them are for the calendar year 1924. The partnership filed a partnership return on the basis of a fiscal year ending April 30, 1924. The appellants included in their individual returns for the calendar year 1924, their distributive shares of the partnership profits for its fiscal year, thus including eight months of firm profits earned in 1923. The Commissioner correctly found the taxes on income attributable to 1923 at the rates prevailing for that year, but refused to allow the appellants a reduction of 25% of such taxes under Sections 1200 and 1201 (b) of the Revenue Act of 1924. As a result, the appellants say that they have been improperly held for a deficiency in their income taxes to the amount of $6,811.08 in the case of Shearer and $5,933.23 in the case of Stewart. The Board of Tax Appeals affirmed the action of the Commissioner.

The question before us is whether the appellants are entitled to receive a 25% reduction of their income taxes on that portion of the partnership income which was, by Section 207 (b) of the Revenue Act of 1924, taxable at 1923 rates.

Sections 218 (a) of the Act of 1924 provided that persons carrying on business in partnership should be liable for income taxes only in their individual capacity. It re-

quired that, if the income of a partner was computed for a period different from that of the partnership, there should be included in his individual return his distributive share of the net income of the partnership for any accounting period ending within the taxable year upon the basis of which his own income was computed.

In other words, Section 218 (a) required each appellant when he filed his return on March 15, 1925, for the calendar year 1924, to bring in his distributive share of the partnership income for the entire fiscal year that ending April 30, 1924. Thus each return, though for the year 1924, necessarily included income of the partnership for eight months' of 1923.

By the Revenue Act of 1924, rates for income taxes were greatly reduced. Section 207 (a) dealt with cases where taxpayers make returns for a year, different from the calendar year, and the rates are changed during the period. It provided that in such cases the tax on the entire income for the fiscal year should be computed at the rate prevailing during the first calendar year and the proportion of the tax which the period in which these rates were in effect bore to the entire fiscal year should be ascertained. To this sum should be added the proper proportion of the tax computed at the rates prevailing during the second calendar year in order to get the total. This section covered individual taxes only, for, by reason of Section 218 (a), supra, individuals, and not partnerships, are liable for income taxes and the return of a partnership is essentially no more than an information return.

The method of calculating the tax upon partnership income to be included in individual returns, in cases where rates have changed and the income has accrued in calendar years having different tax rates, was prescribed by Section 207 (b) of the same Revenue Act. Section 207 (b) applies the 1923 rates to the proportion of the fiscal year of the partnership falling within the calendar year 1923 and applied the 1924 rates to the proportion of the fiscal year falling within the calendar year 1924. For purposes of surtax it places the partnership income subject to the 1924 rates in the lower brackets, and the income subject to the 1923 rates in the higher brackets. In doing this, Congress, so far as possible, effectuated the high sur-taxes of 1923 by

applying them to the proportion of the income allocated to 1923 at the top.

Owing to the surplus in the Treasury in 1923, it was decided to low income tax rates and it was at first proposed to make the new Revenue Act applicable to 1923 income. But as the bill was not ready for passage until after the returns for 1923 income had been filed, it was thought best to limit the relief to 1923 income to a credit or refund of 25%. Accordingly the following provisions were inserted in the Act of 1924:

"Sec. 1200. (a) Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return. * * *

"Sec. 1201. (a) Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period. * * *"

We think it clear that none of the statutory provisions just quoted afford appellants the relief which they ask. Section 1200 (a) does not, for it only relates to a taxpayer making a return for the calendar year 1923 and Stewart and Shearer each made a return for the calendar year 1924. It allows a 25% credit or refund upon the whole amount properly shown as the tax upon a return for that calendar year, whenever the income may have accrued. Under Sec-

tion 218 (a) taxpayers had to bring in the distributive share of any partnership income for an accounting period of the partnership ending within the taxable year, upon the basis of which the partners' net income was computed. Owing to this latter section, as construed by the Department, Stewart and Shearer would have been entitled to a 25% deduction upon income of their partnership accruing during the entire fiscal year from April 30, 1922 to April 30, 1923.

Section 1201 (a) applies only to a taxpayer making a return for a period beginning in 1922 and ending in 1923. If the appellants had been making their individual returns for a period beginning April 30, 1922, and ending April 30, 1923, this section would have applied, but they were making them for the calendar year 1924, and not for a fiscal year.

Section 1201 (b) applies to a taxpayer making a return for a period beginning in 1923 and ending in 1924. The appellants were not making a return for such a period, but for the calendar year 1924. By its terms, Section 1201 (b), as Section 1201 (a), relates only to taxpayers reporting income for a fiscal year different from a calendar year—a situation not involved here. Section 1201 (a) covers only cases where a taxpayer, not a partner, is reporting income under § 207 (a) for a split fiscal year. Under § 207 (a) Section 1201 (b) deducts 25% from the proportion of the tax alloted under § 207 (a) to 1923. Section 1201 (b) is not applicable to a case where partnership income, and not the tax, is allocated between separate years as provided in the case of partnerships by § 207 (b).

The strongest argument for the taxpayers is that Congress intended to allow a general reduction of taxes paid for all income accruing in the year 1923. This prevailed with the Court of Appeals of the First Circuit in White vs. Maddison, 45 Fed. (2d) 335. Congress allowed reductions under § 1200 (a) to those who filed returns for 1923 on a calendar year basis, and under § 1201 (a) and § 1201 (b) to those who filed for 1923 or 1924 on a fiscal year basis. Must we not suppose that it intended to allow a reduction of the tax on an individual who reported for his 1924 return his distributive share of the net income earned partly in 1923?

An affirmative answer to this query seems impossible. In the first place Congress might well have thought that

most partnerships were continuous during the periods covered by the remedial legislation relating to 1923 income and that when a partner whose year for accounting ended in 1923, got a 25% deduction on earnings embracing firm income accruing in 1922, as well as down to the termination of the partnership fiscal year, in 1923, this was sufficient relief from the high tax rates prevailing in 1923. If, however, the contention of the appellants were adopted, such a partner would get not only a deduction on partnership income for a split year beginning in 1922 and ending in 1923, he would also obtain a deduction on partnership income during the remainder of 1923. In other words, in a case like the present, he would get a deduction on twenty months of partnership income.

Another argument even more fatal to appellants' position is that Section 1201 (b), if applicable, would allow a credit or refund of 25% on the proportion of the total tax paid by the reporting taxpayer at 1923 rates which the portion of the period falling within the calendar year bore to the fiscal year of the partnership.

An allowance of 25% of the portion of the tax upon firm income, required by Section 207 (b) to be placed in the higher brackets, and thus to be calculated at the highest rates, would be for a different sum than that allowed by Sec. 1201 (b). In other words, it would not be on two-thirds of the whole tax for the fiscal year as required by Section 1201 (b), but on a tax which two-thirds of the net firm income would yield when placed in the higher brackets.

The difficulties which the position of appellants involves may be further amplified. If the tax is computed under Section 207 (b) the method is for the taxpayer to divide his income into two parts according to the year in which it was earned; the income attributable to 1924 is then put in the lower brackets, and the income attributable to 1923 is put in the next higher brackets.

If the tax is computed under Section 207 (a) the method is for the taxpayer first to consider all his income as earned in 1923, to compute his tax on that basis, and then to take such proportion of the tax as the portion of the fiscal year falling within the calendar year 1923 is of the entire period. Then the taxpayer considers all his income as earned in 1924, computes his tax on that basis, and takes such proportion of the tax as the portion of the fiscal

year falling within the calendar year 1924 is of the entire period. In that way he gets the two items that make his total tax for a fiscal year.

These two methods of computing taxes are different and would produce entirely different taxes on the same income. Those computed under Section 207 (b) would, in the present case, be more than two-thirds of the total tax figured at 1923 rates because of the higher brackets in which the portion of the income applicable to 1923 would be placed. Taxes computed under Section 207 (a) would be exactly two-thirds of such total tax.

The refund provided under Sections 1201 (a) and 1201 (b) is based upon a tax computed under Section 207 (a) because Sections 1201 (a) and 1201 (b) allow a refund on the "proportion" of the tax for the entire fiscal year which the portion of the fiscal year falling within 1923 bears to the entire period. Such a "proportion" of the tax is employed only in Section 207 (a). It has no relation to Section 207 (b) by which the "income", and not a "proportion" of the tax, is allocated between separate years. Therefore a refund of 25% of the amount which is placed in the higher brackets under Section 207 (b) finds no warrant in the statute.

If it be contended that the taxpayers, though not entitled to a refund based on the taxes computed for 1923 under Section 207 (b), are entitled to a refund of two-thirds of the tax for the partnership year calculated under Section 207 (a), the answer is that a refund based upon such a tax would bear no relation to the taxes which must be computed on partnership income under Section 207 (b). To maintain this last contention would be to allow the refund of a percentage of a tax that was not, under the statute, the tax to be computed against the partnership income.

The Board of Tax Appeals has uniformly adopted the construction of the statute which seems to us inevitable and indeed the only interpretation that will reconcile the various statutory provisions relating to the 25% credit or refund. The opinion of Mr. Sternhagen in Appeal of Charles Colip, 5 B. T. A. 123, appears to reach the correct result rather than in White vs. Maddison, supra, from which, with all deference, we feel compelled to differ.

The appellants argue that a refusal to allow a refund on partnership income accruing in 1923 because under the Revenue Act it has to be returned as part of the 1924 income of the partners is arbitrary and violates the Fifth Amendment of the Constitution. But all taxpayers similarly situated are treated alike. There may be individual hardships and a firm which did not exist in 1922 and began business in 1923 would be unable to obtain any refund under the remedial provisions of the Act of 1924. On the other hand, as we have pointed out, if the contention of the appellants were adopted a partnership having business beginning April 30, 1922, would secure a refund on taxes arising from the partnership business that was based not upon 1923 income, but upon eight months also of income accruing in 1922. The revenue law is full of such hardships. If a man happens to sell property in a year when the tax rates are high he will be obliged to pay a tax often attributable to the accumulation of years upon capital gain. Except for practical considerations it would be more consistent with an ideal system to tax accruals in value from year to year, and not to wait for realization of capital gain. But such a method would require the business world to spend most, instead of much, of its time in accounting. Taxation can rarely be scientifically uniform, and it does not have to be. It need only be based on a reasonable classification which we cannot say was absent here. Barelay vs. Edwards, 267 U. S. at p. 450; Evans vs. Gore, 253 U. S. at p. 256; Diamond Shoe Co. vs. Commissioner, 42 Fed. (2d) 148.

The order of the Board of Tax Appeals is affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the court-rooms, in the Post Office building, in the city of New York, on the 24th day of July, one thousand nine hundred and thirty-one.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

WILLIAM A. W. STEWART, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appeal from the United States Board of Tax Appeals

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be, and it hereby is, affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

Wm. Parkin, Clerk.

[Endorsed:] United States Circuit Court of Appeals, Second Circuit. William A. W. Stewart v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 24, 1931. William Parkin, Clerk.

UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, number from 1 to 48, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the case of William A. W. Stewart, Petitioner, against Commissioner of Internal Revenue, Respondent, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of September, in the year of our Lord one thousand nine hundred and thirty one, and of the Independence of the said United States the one hundred and fifty sixth.

William Parkin, Clerk. (Seal of United States Circuit Court of Appeals for the Second Circuit.)

[fol. 45] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 30, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,284. U. S. Circuit Court of Appeals, Second Circuit. Term No. 470. William A. W. Stewart, petitioner, vs. David Burnet, Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed October 19, 1931. File No. 36,284.